

**STATE OF MICHIGAN
IN THE SUPREME COURT**

BLACKHAWK DEVELOPMENT CORPORATION,
a Michigan corporation, and DEXTER
CROSSING, LLC, a Michigan limited
liability company,

Plaintiffs-Appellants,

vs.

VILLAGE OF DEXTER and DEXTER
DEVELOPMENT,

Defendants-Appellees.

Supreme Court Docket
No. 126036

Court of Appeals Docket
No. 240790

Washtenaw County Circuit
Court Case No. 00-724-CZ

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BRIEF IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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STATEMENT REGARDING JURISDICTION

Defendant-Appellee Dexter Development, LLC does not dispute Plaintiff-Appellants' Statement of the basis of jurisdiction.

COUNTER-STATEMENT OF QUESTION PRESENTED

DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE VILLAGE OF DEXTER MAY USE A PUBLIC ROAD EASEMENT FOR CONSTRUCTION OF UTILITIES, SIDEWALKS, STREET LIGHTING, AND ROAD ACCESS WITHIN THE EASEMENT?

Plaintiff-Appellants say: "No"

Defendant-Appellees say: "Yes"

The Trial Court said: "Yes"

The Court of Appeals said: "Yes"

COUNTER-STATEMENT OF FACTS

In 1990 the Village of Dexter determined that, for reasons of public safety, it was necessary to realign and reconfigure the intersection of Dan Hoey Road and Dexter-Ann Arbor Road. The Village passed a resolution which stated:

"WHEREAS, the Village of Dexter, acting in the best interest of its citizens and in an effort to improve the public safety and welfare, has planned for the reconstruction of the badly-deteriorated and unsafe easterly half of Dan Hoey Road. Included in the reconstruction of Dan Hoey would be a realignment southward of its intersection with Dexter-Ann Arbor Road; and

. . .

WHEREAS, the Village of Dexter has determined that such property which is further described on Exhibit A is necessary for this purpose; and

. . .

NOW, THEREFORE, the Village of Dexter does hereby resolve and declare:

- (1) The acquisition and development of the property described in Exhibit A, for the use and benefit of the public is a necessary public improvement and within the scope of the powers of the Village.

. . . "

Resolution of February 12, 1990
(Exhibit 1)

The most immediate purpose of the Resolution was to reduce the sharply acute angle of this oddly-shaped intersection, making it

more regular and bringing it into conformity with current design standards for public roadways. In addition, a longer-term purpose was to promote the future development of the entire community (Clark Depo., pp. 6-7, 22, 26, 43-44).

In order to accomplish these public purposes, the Village determined that it was necessary to relocate a portion of Dan Hoey Road slightly to the south. Dan Hoey Road is an east-west roadway which historically ran straight across the section line between Section 5 and Section 8, Scio Township. The Village, based upon the advice of its traffic and safety consultant, decided to move a portion of the road, approximately 1100' in length, to the south. The new roadway followed an arc which curved to the south, reached a maximum distance from the old roadway of approximately 120', then curved back to the existing right-of-way. This created a piece of land, slightly larger than 1 acre, crescent-shaped, with the straight line of old Dan Hoey Road as its northern boundary and the curved arc of new Dan Hoey Road as its southern boundary. Attached Exhibit 4 depicts both the old and the new roadways and the crescent in between, which is now the subject of this suit.

The five properties adjacent to the old roadway to the north contained five homesites, each with its own driveway access to the old road. The property to the south, on which the new roadway was to be built, was then owned by the Kingsley Family Trust. In order to acquire the new road right-of-way, and pursuant to its

Resolution, the Village filed a condemnation suit against the Kingsley Trust (Washtenaw Circuit Court Case No. 90-38240-CC). That case proceeded before the Honorable Melinda Morris; and as a result of negotiations conducted during the condemnation trial, the Village and the Trust entered into a settlement agreement (attached Exhibit 2). The agreement required the Trust to convey to the Village an "easement for public roadway purposes" over the entire crescent-shaped parcel. In accordance with the agreement, the Trust granted to the Village an easement over the subject land "for the purpose of relocating, establishing, opening and improving Dan Hoey Road" (attached Exhibit 3; Clark Depo., pp. 23, 28; Kingsley Depo., p. 24).

Pursuant to the easement, the Village in fact relocated Dan Hoey Road as planned. In addition to facilitating the road realignment, the easement served another ancillary but important purpose: it allowed the Village to preserve access to the new Dan Hoey Road. Without the right to extend their driveways across the easement, the five northerly homeowners would lose their road access. Once the new road was built, the Village accordingly extended the driveways across the easement to the new road (Clark Depo., pp. 20-21, 38; Exhibit 5, aerial photo). Throughout all of this, there was and still is a gas main in Dan Hoey Road providing gas service to these properties. The Village's agreement with the

Kingsley Trust expressly required the Village to continue providing utilities across the road easement (see Exhibit 2).

Several years later the Trust sold to Plaintiffs herein the property south of the old Dan Hoey Road, which property includes the crescent. This conveyance was made subject to the recorded easement in question, of which Plaintiffs were fully aware. Plaintiffs have subsequently developed the land south of new Dan Hoey Road as a commercial property known as "Dexter Crossings." The crescent remains open land, although it benefits Plaintiffs because it is included in the calculation of Plaintiffs' required open space (Kingsley Depo., p. 84).

Defendant Dexter Development Company has, in a series of separate transactions, acquired the five homesites north of the crescent, has consolidated the properties, and is developing them together as the "Dexter Commerce Center." Both of the parties' developments are governed by the adoption by the Village of an amendment to its Zoning Ordinance called the "Dexter-Ann Arbor Road Corridor Over-Lay District." The regulations contained therein specify the location of commercial developments, entrances, improvement, utilities, and roadways along Dan Hoey Road within the Village.

In developing their land to the south ("Dexter Crossings"), Plaintiffs availed themselves of access to the new roadway by creating, with the approval of the Village, a driveway access

located approximately at the mid-point of the 1100' stretch of new roadway (i.e. the "bottom" of the crescent's arc). Subsequently, in the course of reviewing Defendant Dexter Development Company's site plan for development of the property to the north, the Village required that Defendant's access to new Dan Hoey Road would be located directly across the new road from Plaintiffs' driveway (Kingsley Depo., pp. 57, 94-98). For obvious traffic and safety reasons, one regular 4-way intersection was highly preferable to multiple 3-way intersections, located on opposite sides of the road but in close proximity to each other (Dettloff Depo., pp. 8-14). Accordingly, the five former driveways leading from old Dan Hoey Road south across the easement were abandoned in favor of the new driveway. The new driveway will be dedicated to the public and will be maintained by the Village as a public road (Westover Depo., pp. 15-18). This road will run through the development and connect to Dexter-Ann Arbor Road on the north, providing a second point of ingress/egress and relieving pressure on the intersection of Dan Hoey Road and Dexter-Ann Arbor Road.

In reliance upon this development plan, Defendant has constructed the new road/ driveway access to public road design standards (Westover Depo., p. 19). Included in this work is necessary public utility (gas, water, sewer) tap-ins which will meet the Village's ongoing obligation to provide utilities to the lands on both sides of the road. The work also includes public

sidewalks, street lighting, and landscaping on both sides of Dan Hoey Road (Kingsley Depo., pp. 206-207, 216-217).

Plaintiffs filed the instant lawsuit, claiming that construction of these improvement within the public road easement exceeds the Village's rights under the easement. Plaintiffs seek a permanent injunction against use of the easement for these public road improvements, as well as money damages, claiming that the improvements benefit only Dexter Development Corp. Following discovery, Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). On March 25, 2002, the trial court entered its Order Granting Summary Disposition, holding that the improvements are within the scope of the public road easement. Plaintiffs appealed by right to the Court of Appeals. On January 27, 2004, the Court issued its Opinion affirming the Order of the trial court, Smolenski, J., dissenting. The Court of Appeals held that the public road easement was unambiguous and that the improvements were clearly within its plain language and its lawful and stated purposes.

Plaintiffs filed this Application for Leave to Appeal on April 26, 2004.

ARGUMENT

I. STANDARD OF REVIEW

MCR 7.302(B) provides that an Application for Leave to Appeal to the Supreme Court must demonstrate one of six enumerated grounds. The only grounds which even arguably pertain to this Application are those set forth in subrules (2), (3), and (5).

Upon review, appellate courts review decisions concerning summary disposition de novo. Dressel v Ameribank, 468 Mich 557, 561; 664 NW2d 151 (2003). On a motion for summary disposition, the trial court considers the pleadings, affidavits, depositions, and other documentary evidence available to it and grants summary disposition if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. Frankenmuth Mutual Ins. Co. v Masters, 225 Mich App 51, 55-56 (1997), rev'd on other grounds 460 Mich 105 (1999). The court makes all reasonable inferences in favor of the non-moving party. Bertrand v Alan Ford, Inc., 449 Mich 606, 618 (1995). The court should grant summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. Smith v Globe Life Ins. Co., 460 Mich 446 (1999).

II. SUMMARY OF ARGUMENT

The Village of Dexter owns a public road easement "for the purpose of relocating, establishing, opening and improving Dan Hoey Road in the Village of Dexter." In conjunction with Defendants' proposed development of the north side of Dan Hoey Road, the Village required Defendant to construct underground utilities, public sidewalks, street lighting, and a public access road on the easement. These improvements are clearly within the broad purposes and rights of the village in a public road easement. The improvements serve the public health, safety, and welfare and are therefore within the lawful uses of a public road easement.

Plaintiffs are not entitled to compensation, as this is not a condemnation case but a case concerning the proper use of a recorded public road easement which the Village held for years before Plaintiffs acquired their land with full knowledge of the easement. The Court of Appeals was correct, and Plaintiffs have demonstrated no reason why this Court should grant leave to appeal or otherwise disturb the rulings of the Court of Appeals and the trial court.

III. THE COURT OF APPEALS CORRECTLY HELD THAT
THE VILLAGE OF DEXTER MAY USE A PUBLIC
ROAD EASEMENT FOR CONSTRUCTION OF
UTILITIES, PUBLIC SIDEWALKS, STREET
LIGHTING, AND ROAD ACCESS WITHIN THE
EASEMENT

A. The Improvements Are Permitted By The Plain Language Of The
Easement

The easement granted to the Village of Dexter clearly states
that it is:

" . . . an easement for the purposes of
relocating, establishing, opening, and
improving Dan Hoey Road in the Village of
Dexter."

(emphasis added)

As the Court of Appeals properly recognized, the term
"improve" has a commonly-understood meaning:

"The term 'improve' is defined as: 'To
meliorate, make better, to increase the value
or good qualities of, mend, repair, as to
'improve' a street by grading, parking,
curbing, paving, etc.' Black's Law Dictionary
(5th Ed), p. 682."

Opinion, p. 5

The very examples provided in this dictionary definition show
that the utilities, sidewalks, street lighting, and access roads
required by the Village and installed by Defendants herein are
"improvements." As such they serve the purpose and have the effect
of "improving" Dan Hoey Road. This is plainly and undeniably one

of the explicit purposes of the easement. The Court of Appeals correctly held that by the plain meaning of the English language, facilities such as access roads, sidewalks, street lighting, and utilities serve to "improve," i.e., "make better," the public roadway.

Plaintiffs' Application (especially pp. 12-14) resorts to the nonsensical argument that "improvements" are not within the stated purpose of "improving" the road. Plaintiffs go so far as to state, in bold type, that **"The terms 'roadway improvements' and 'public roadway' are not contained within the express easement in this case."** (Application, p. 12). Therefore, say Plaintiffs, the improvements are "outside the four corners" of the easement. Frankly, this argument sounds like something from Alice In Wonderland. How can "improvements" not be "improving" the road? Plaintiffs' argument is overly literal to the point of absurdity. There would be very few documents of any kind which would have any meaning if this kind of rigid literalism were applied to ordinary language. The Court of Appeals properly read the plain language of the easement in accordance with the ordinary meaning of words and properly held that access roads, sidewalks, street lighting, and underground utilities are improvements to the public road.

B. A Public Road Easement Broadly Encompasses All Uses In The Public Interest

It has long been established that a public road authority's easement for the purpose of building, maintaining, and improving a public roadway is broader than mere surface travel and maintenance, and embraces all public purposes within the right-of-way. Such a dedication includes all uses, such as the installation of sewers and other utilities, contemplated to be in the public interest and for the public benefit. This principle was clearly stated by Justice Cooley in Warren v Grand Haven, 30 Mich 24 (1874):

"The dedication of land to the purposes of a village or city street must be understood as made and accepted with the expectation that it may be required for other public purposes than those of passage and travel merely, and that under the direction and control of the public authorities it is subject to be appropriated to all the uses to which village and city streets are usually devoted, as the wants or convenience of the people may render necessary or important...

One of these uses is the construction of sewers, which are usually laid under the public streets; and the custom to lay them there must be assumed to be had in view when a way is dedicated, and the act of dedication is a waiver of any claim to compensation the owners might otherwise have made, had a sewer been laid across their premises."

Id., citing Kelsey v King, 32 Barb., 410; West v Bancroft, 32 Vt., 367; Dillon Mun. Corp., §§544, 554 (emphasis added)

In Detroit City Railway v Mills, 85 Mich 634, 48 NW 1007
(1891), this Court stated:

"Whatever may have been the ancient adjudications limiting the rights of the public in the streets to passage and repassage, and whatever may now be the rule with regard to the highways in the country, with the growth of population in our cities have come increased needs for heating, lighting, draining, sewerage, water, etc., and with these there has come also a corresponding extension of the public rights in the streets. Immense sewers and water mains may be dug, and the soil removed, culverts and drains constructed, without compensating the abutting owners. It may now be considered the well-settled rule that the streets of a city may be used for any purpose which is a necessary public one, and the abutting owner will not be entitled to a new compensation, in the absence of a statute giving it."

85 Mich at 653, 654
(emphasis added)

This fundamental principle has been acknowledged and approved through successive eras of our jurisprudence. In Village of Grosse Pointe Shores v Ayres, 254 Mich 58, 235 NW 829 (1931), which dealt with a condition subsequent in a deed given for the purpose of improving a public highway, this Court stated:

"The dedication of property for the purpose of a highway carries the right to public travel and also the use for all present and future agencies commonly adopted by public authority for the benefit of the people, such as sewer, water, gas, lighting, and telephone systems."

254 Mich at 64
(citations omitted)

Moreover, as the Court of Appeals herein correctly noted, any conditions which would limit the public use of a roadway easement are void:

"A condition in a deed of dedication prohibiting the uses above stated or circumscribing the future freedom of action of the authorities to devote the street to the wants and convenience of the public is void, as against public policy or as inconsistent with the grant. And where the condition in the dedication for a street is void as against public policy or is inconsistent with the grant, the dedication is effective but the condition is inoperative."

Id. at 65

In Eyde Brothers Development Co. v Eaton County Drain Commissioner, 427 Mich 271, 398 NW2d 297 (1986), this Court again addressed the issue whether the public highway easement in a highway by user applied only to surface travel on the highway, or whether the easement could also be used to install a subsurface sewer line. This Court found, after a thorough analysis of precedent, that the scope of a public easement in a highway by user includes access to the subsurface for construction of a sewer system. In so holding, the Court did not establish a new principle; rather, it merely extended long-settled law regarding dedicated easements to those created by law (highway by user). Thus while Plaintiffs' Application argues (pp. 17, 20) that Eyde is inapplicable because it pertains only to rights-of-way acquired by

user, this argument is completely backwards. It ignores the fact that it was already well established that dedicated easements (such as this one) include, as a matter of law, the right to use the easement for other public purposes. That question was settled at least as early as 1874 (Warren, supra).

All of these decisions, though far from exhausting the field, are consistent with the position taken by the State Attorney General, as well as several other opinions of the Supreme Court and the Michigan Court of Appeals. See, Op. Atty. Gen. 1980, No. 5746, p. 892; Governale v City of Owosso, 387 Mich 626, 198 NW2d 412 (1972); Hull v Green Oak Township, 24 Mich App 309, 180 NW2d 204 (1970); Gunn v Delhi Township, 8 Mich App 278, 154 NW2d 598 (1967); and Cleveland v City of Detroit, 324 Mich 527, 37 NW2d 625 (1949).

Put bluntly, a public road easement is by law also an easement for all public purposes, broadly construed to include those uses which are "necessary or important" to the "wants or convenience" of the public. Any attempt to restrict those uses is void. The public health, safety, and welfare are broad interests, and public officials plainly may use a road easement broadly to further those interests. This is equally true of any dedication, whether by easement or in fee simple.

Throughout this case, at every stage of the proceedings, Plaintiffs have failed to recognize the fundamental difference between a private easement arranged between private parties and a public road easement. That error is repeated in their Application,

pp. 14-16. Thus while Plaintiffs concede that our easement was "for public roadway purposes" (Application, p. 14), they fail to acknowledge that this vests broad authority to use that easement for public improvements. Indeed, Plaintiffs cite no fewer than 12 cases which state well-recognized principles applicable to private easements, but not one case involving a public roadway easement. These are fundamentally different legal animals. Each has its own well-developed body of law, but private easement law has nothing to do with the rights of public bodies under road easements. The latter are much more broadly defined than the former. Our law does not allow for the limitation of a public road easement by the constraints imposed by private easement law. Plaintiffs' reliance on private easement cases is wholly misplaced, and plainly led the Court of Appeals dissent astray.

C. Use Of The Road Easement For The Improvements Serves The Public Interest

1. Public Sidewalks, Street Lighting, and Underground Utilities Promote the Public Safety and Welfare

The mere statement of this proposition seems self-evident. Surely Plaintiffs cannot seriously contend that public sidewalks and street lighting are not of great value to the public. Surely such amenities are, at this point in urban evolution, standard public improvements which the "wants or convenience of the people may render necessary or important." Indeed, lighting was specifically recognized as a public improvement in Mills and Ayres,

supra, and all of the cited cases recognize one or more utilities as improvements in the public interest. In this case, the Kingsley Trust's Settlement Agreement with the Village (Exhibit 2) plainly requires preservation of utility rights in the easement, in part for the benefit of the very property which Plaintiff now owns. In addition, some of the properties to the north needed continued access to Dan Hoey Road for their existing utility services (Kingsley Depo., pp. 41, 43-44). As former Village attorney E. Spaulding Clark stated, the Village took the easement with the full expectation that "the expanded easement as well would have served for future utility locations and improvements that were contemplated in the long run by the Village" (Clark Depo., p. 38). Use of a public road easement for these improvements has long been specifically recognized as a public benefit under Michigan Law.

2. The Road Access Promotes the Public Safety and Welfare

A. The Realignment Was Undertaken, and the Easement Acquired, for Reasons of Public Safety

As the 1990 Village Resolution authorizing condemnation of the easement (Exhibit 1) states, realignment of the old intersection was necessary for the public safety and welfare. A mere glance at the old intersection as shown on Exhibit 4 demonstrates the sharply acute angle of the intersection. This was a sight distance problem for motorists. It did not meet design standards for intersections

in urban areas. The Village was properly concerned from a safety standpoint (Kingsley Depo., p. 15). As former Village attorney Clark testified:

"Q The public purpose in the easement included, as I understand it, the very strong public interest in realigning the intersection of Dan Hoey and Dexter-Ann Arbor Road as well?

A Yes.

Q That was -

A That's true, yes.

Q That's a public safety concern?

A The paving and realigning of the road were public safety issues.

Q And the sight distance problem as well?

A Right."

Clark Depo., pp. 43-44

This was also consistent with the Village's long-term planning interests:

"Q Were there any purposes underlying the condemnation that, to your knowledge, were not stated in the Village board's resolution to take the land?

A Well, I think that this probably summarizes the crucial and pertinent reason, the larger reasons, relating to the industrial development and future development of the entire community. I think that was necessary. But I would say it was part of a much larger scheme. The immediate purpose was to improve the

road; the longer-term purpose was in the community development arena."

Clark Depo., pp. 25-26
(emphasis added)

B. Use of the Easement for Access to Dan Hoey Road Promotes Public Safety

The Village very properly required that Mr. Kingsley provide access to the Dexter Commerce Center by constructing the roadway access across the crescent to reach Dan Hoey Road. Janet Keller, the Village's Zoning Enforcement Officer, testified that, based on a traffic impact analysis, access to the property from Dan Hoey Road was necessary; to have allowed access only from Dexter-Ann Arbor Road "would definitely not have been in the best interest of the people of the Village and people traveling through the Village" (Keller Depo., p. 98). She further stated:

"Q Would it have been sound planning practice to approve this development without an access to Dan Hoey Road?

A I do not believe it would have been."

Keller Depo., p. 100

Kenneth Dettloff, the Village's outside planning consultant, made a "strong recommendation" that the Village require access onto Dan Hoey Road (Dettloff Depo., pp. 11-12). Scott Westover, the Village's consulting engineer, also concurred in the wisdom of access across the crescent (Westover Depo., pp. 13-14). Accordingly, the Development Agreement which the Village signed

with Dexter Development required that there be two points of ingress/egress, one on Dan Hoey Road and one on Dexter-Ann Arbor Road (Kingsley Depo., p. 216). Indeed, the courts can take judicial notice that the published standards of many, if not most, public agencies require two points of ingress/egress from any development. This is a matter of public safety and welfare, involving access for emergency vehicles, evacuation plans, and all matters affecting the public order.

C. Locating the Access Road Across From Plaintiffs' Access Road Promotes Public Safety

The specific location of the access across the crescent is a matter of public concern as well. Ms. Keller testified that aligning the two driveways, to create a single 4-way intersection rather than two 3-way intersections in close proximity, was required by the Village's traffic engineering standards (Keller Depo., p. 66). Planning consultant Dettloff agreed, stating "...it's a good idea to align the driveways or the accesses whenever you can" (Dettloff Depo., p. 9). Mr. Kingsley was given no choice in the matter:

"Q Is it your testimony that the only reason that you're traversing the crescent-shaped parcel with your access road water main and other improvements is because the Village is requiring you to do so?

A I would say that we're traversing it at that point because the Village required us to do so. Their argument was that they wanted to see a southerly exit to

this that would align with Lexington Drive and Dexter Crossing, so it would be a four-way intersection, rather than having traffic come out over here and if they wanted to go across here (indicating)."

Kingsley Depo., pp. 90-91

D. The Driveway Access is an Improvement to Dan Hoey Road Which Replaces Five Pre-existing Access Driveways

The roadway realignment, which was entirely proper and plainly within the explicit wording of the easement, had a side effect: it deprived the five homeowners on the north side of the old road from access to the road. The Village always recognized its obligation to preserve their access, and accordingly built driveway extensions across the crescent to afford access to the new road:

"Q You indicated that the Village would be in jeopardy. Do you know what you meant by that? Were you concerned Mr. Kingsley might sue you if he couldn't put this road there?

A I believe that my using that word was indicating that the Village had an obligation to provide access to this property from Dan Hoey Road. And who that would have been jeopardizing was not specified at that time.

. . .

Q Would you agree with me that but for Mr. Kingsley's commercial development, that construction of the center access and westerly access roads across the Blackhawk parcel is unnecessary?

A At this point in time, yes. Providing access to the property, though, is required. But if there is nothing there, there would be no need. There were driveways prior to Mr. Kingsley coming forward with this development to provide access to the existing homes that were located on this property. And this is, in essence, a replacement to those access points.

Q How is that?

A There were two or three homes, private homes, that were located along Dan Hoey Road when Mr. Kingsley purchased the property that had driveway access across this easement to Dan Hoey Road. And those remained until the development of this property began."

Keller Depo., pp. 61, 81-82
(emphasis added)

Exhibit 5 depicts the extended driveways. Without the easement this could not have been accomplished, as the Village always recognized:

"Q You indicated that you did not deem it necessary to require Mr. Kingsley to reduce to writing or take on any guarantees of protecting the access of the northerly property owners. And if I'm understanding correctly, you said the reason--or you indicated that the reason you didn't do that was because you felt the easement, as taken by the Village, was the mechanism by which that access was preserved?

A That's correct."

Clark Depo., pp. 37-38

Moreover, reducing the total number of access drives by creating one center access point is an improvement to Dan Hoey Road, per the testimony of planning consultant Dettloff:

"Q Was the issue then to make sure that this center drive shown on the plan would align with Lexington Drive across Dan Hoey?

A We wanted to reduce as many accesses or generically curb cuts onto Dan Hoey Road. There were several accesses as the parcels were laid out and supplying an alternate - first of all, a reduction of access points and funneling of the driveway to a driveway which already existed on the south side was thought to be the best alternative to traffic flow. Moreover, supplying an alternate vehicular access away from the road to the north was part of the alternate plan...generally speaking, it's a good idea to align the driveways or the accesses whenever you can.

. . . .

Q As this plan is proposed, how did your discussion or anything you discussed with Janet Keller deal with reducing curb cuts?

A Nothing other than the fact that there were a number of accesses prior to the site plan being submitted.

Q The residential driveways?

A Yes.

Q And what did you talk about in that regard?

A We talked about consolidation whenever you can on a thoroughfare such as Dan Hoey is and that would be about it."

Dettloff Depo., pp. 8-10
(emphasis added)

3. Incidental Benefit to Defendant Does Not Negate the Larger Public Benefits of the Improvements

Plaintiff repeatedly suggests that the "real" purpose of allowing use of the easement for construction of the center access drive and underground utilities is simply to benefit Dexter Development, a private party. This is plainly untrue. Each of the Village representatives who has testified in this matter has laid out compelling public interests in using the easement for the purposes required of Dexter Development. The Village always recognized that the easement's purposes, including establishing and improving Dan Hoey Road, required use of the easement for road access, utilities, and driver and pedestrian safety over a long period of time. Though Plaintiffs repeatedly have emphasized the perceived private "benefit" to Dexter Development, the Village representatives adamantly insisted on explaining the public benefits:

"Q Were there also provisions and ways in which the easement taken by the Village also served the benefit of the properties to the south at that time, being the Kingsley property?

A Well, I believe both the expanded roadway would have served the development purposes, but the expanded easement as

well would have served for future utility locations and improvements that were contemplated in the long run by the Village."

Clark Depo., p. 38
(emphasis added)

Planning consultant Dettloff testified that the sound planning reasons for requiring the center access across the easement work to the benefit of the entire public, including shoppers, pedestrians, and motorists:

"Q The issues you raised regarding good planning reasons for having these accesses, those issues all worked to the benefit of the developer, correct?

A As well as the pedestrians and individuals who do use the site. If it was a question of alignment of the driveways, it would be for anybody who was using Dan Hoey Road."

Dettloff Depo., p. 27
(emphasis added)

Zoning Enforcement Officer Keller expressed the broad public interest in these terms:

"Q Is there any public interest that you are aware of being served by the construction of these access roads other than easy access for the public and safe access for the public to Mr. Kingsley's development?

A I think that safe access to the development is a very important reason to request and/or require this access, some access from Dan Hoey Road.

. . .

Q In your view, did these access drives benefit Mr. Kingsley's project?

A I think that they benefit Mr. Kingsley's project and they benefit the people of the Village by providing access to that development.

Q And the benefit to the people of the Village is they have access to the development, correct?

A They have access, they have safe access, yes.

. . .

Q Having access onto Dan Hoey Road, is that a benefit not only to the general public or not only to the public who may use this development as customers of the gas station or bank, but also to the general public who use the roadway and the general public as represented by the populous (sic) of the Village of Dexter?

A Yes.

Q Thank you. Would it have been sound planning practice to approve this development without an access to Dan Hoey Road?

A I do not believe it would have been."

Keller Depo., pp. 99-100
(emphasis added)

Plaintiffs' conception of the public interest, by contrast, is rigidly narrow. Plaintiffs argue that because there is also some "benefit" to Dexter Development, the easement is being used improperly. But there is always a "private" interest which

benefits whenever a public road easement is used for any improvement, be it sewer, water, gas, electricity, telephone, traffic control, sidewalks, lighting, or any other amenity. That "private" benefit does not negate the improvements' "importance" to the "wants or convenience" of the public. Likewise, the fact that "but for" the private development these particular improvements might not be needed today misses the point: it is very often a "private" development or series of developments which spark the need for roadway improvements. That fact does not divest the improvements of their value to the public.

As Ms. Keller put it, "there were no improvements other than public improvements being proposed on that property" (Id., p. 51; emphasis added). Indeed, except in a very generic sense, the center access drive really benefits Dexter Development not at all; it benefits solely the public interest:

"A ... We did a lot of things in this development to try to accommodate the needs of the Village in the future. I mean, water main, that doesn't help us. In terms of this alignment, that doesn't help us.

Q Is it your testimony that having access across the crescent parcel doesn't benefit your parcel at all from Dan Hoey? Having access from Dan Hoey as opposed to having no access from Dan Hoey?

A I always had access.

Q From where?

A The Stanfield property.

Q But Stanfield property traversed over the crescent parcel as well, didn't it?

A Yes. I had the right to do it.

Q So the second access to the center of the property provides you no benefit whatsoever?

A I don't think so.

Kingsley Depo., pp. 97-98
(emphasis added)

Plaintiffs make repeated mention of Dexter Development's agreement, contained in its Development Agreement, to indemnify the Village, implying that this somehow "proves" that the improvements "really" only benefit the developer. This is a red herring. The truth is far less sinister: it is standard practice of all municipalities, including the Village of Dexter, to include such indemnities in all development agreements (Keller Depo., p. 87; Kingsley Depo., pp. 222-224).

4. The Road Easement is not Limited in Time or Duration

Plaintiffs have repeatedly argued that the road easement's purposes were fully accomplished once the road was moved, implying that any later activity goes beyond the rights conveyed. This very narrow and overly literal interpretation would freeze in time the public's use of the road easement, converting it to a construction easement and rendering it a nullity once the road was moved. But the easement is not limited in time or duration. There is no

language of defeasance which would terminate the easement once a particular purpose has been accomplished (see, e.g., Hickox v Chicago & C.S.R. Co., 78 Mich 615, 617; 44 NW 143 (1889)). The activities of "establishing" and "improving" Dan Hoey Road are not one-time events; they are ongoing, dynamic processes. This was clearly the understanding of the Village when it obtained the easement. As stated by former Village attorney Clark:

"Q Were there any purposes underlying the condemnation that, to your knowledge, were not stated in the Village board's resolution to take the land?

A Well, I think that this probably summarizes the crucial and pertinent reason, the larger reasons, relating to the industrial development and future development of the entire community. I think that was necessary. But I would say it was part of a much larger scheme. The immediate purpose was to improve the road; the longer-term purpose was in the community development arena.

. . . .

. . .but the expanded easement as well would have served for future utility locations and improvements that were contemplated in the long run by the village.

Q In other words, this easement is not limited in time or duration?

A That's correct.

Q It continues for the continued benefit of the parcels it serves and the continued public interest of the long term development in the area?

A I think that's true. Many communities will take an expanded easement with a view towards undefined future improvements."

Clark Depo., pp. 25-26, 38
(emphasis added)

Importantly, as the Court of Appeals recognized and as stated in Ayres, supra, Plaintiffs' attempt to now limit the public's use of the easement for the "wants and convenience of the people" is void as against public policy:

"A condition in the deed of dedication prohibiting the uses above stated or circumscribing the future freedom of action of the authorities to devote the street to the wants and convenience of the public is void, as against public policy or as inconsistent with the grant."

Opinion, p. 5, quoting Ayres,
supra, 254 Mich at 65
(emphasis added)

In this context, by definition "establishing" and "improving" Dan Hoey Road includes regulating access to the road, a function which is solely within the purview of the Village. Thus while no particular development was contemplated at the time of the agreement, in general it was well understood that the easement would be useful and necessary for future development. By contrast, Plaintiffs' overly rigid interpretation would mean, taken quite literally as Plaintiffs would have it, that once having moved the

road, the Village no longer had authority even to maintain it. The law is not so foolish.

By law, the road easement is a dedication for all purposes which benefit the public. The improvements in this case go to the very heart of the easement's purpose. Without the ability to provide utilities, sidewalks, lighting, and safe and improved access to new road, the easement and the realignment of the road itself would be useless, or worse, counterproductive. The improvements are an entirely proper and necessary use of the easement in the ongoing task of "improving" Dan Hoey Road.

D. Plaintiffs Suffer No Harm, Nor Is The Burden On Their Land Increased, By Use Of The Easement For Utilities, Road Access Improvements, Sidewalks, And Street Lighting

It is important to note that the small crescent of land at issue has no use whatsoever except for the highway purposes granted by the easement. The land will not support any kind of structure in conformity with Village zoning laws; it is only 120' wide at its widest point. Other than for road purposes, it has value only in one sense: it may be used in computing "open space" requirements under the Township zoning ordinance. Importantly, the Village has permitted Plaintiffs to include the crescent in the calculation of their required open space (Kingsley Depo., p. 84). The crescent is not available to Defendant for that purpose.

The easement had already been conveyed to the Village and recorded long before Plaintiffs purchased the land south of old Dan

Hoey Road. Plaintiffs had full knowledge of the easement, and took the crescent along with the other land south of the old roadway with full awareness of the roadway easement's purpose. Plaintiffs have not been harmed, nor has the "burden" on their land been increased. The fact that Plaintiffs' grantor is now their business competitor in a competing development, and may (or may not) derive some incidental benefit from the improvements the Village required of him, is no justification for Plaintiffs' meritless claim.

Finally, it must be noted that this is not a condemnation case. Plaintiffs have gone to great lengths, in the Court of Appeals and here, to muddy the waters by suggesting that condemnation law somehow applies. The dissent in the Court of Appeals was erroneously misled by this fallacious argument. The authorities cited by Plaintiffs, ostensibly supporting a "heightened scrutiny" over the uses to which this roadway easement may be put, are inapposite. The easement was granted by Plaintiffs' predecessor, and was duly recorded by the Village. Plaintiff was fully aware of its existence and terms when he brought the property. Because this is a public roadway easement, vesting in the Village the right to use the easement for all purposes in the public interest, the Plaintiffs have no right to compensation:

"...the streets of a city may be used for any purpose which is a necessary public one, and the abutting owner will not be entitled to a new compensation, in the absence of a statute

giving it...they have no legal cause for a complaint."

Mills, supra, 85 Mich at 654

. . .

"...[use of the sub-surface for parking] is a proper highway use and the abutting property owner is not entitled to any compensation for such use...."

Cleveland v City of Detroit,
supra, 324 Mich at 537

. . .

"The conclusion appears inevitable that in Michigan non-statutory dedication of land for use as a public road or highway operates to transfer to public authorities and public utility companies the right to construct sewer lines thereunder, and thus there was no deprivation of property in the constitutional sense."

Gunn v Delhi Township,
supra, 8 Mich App at 284

. . .

"Plaintiffs were not entitled to condemnation. Construction of the water main within the highway right-of-way did not increase the burden or servitude upon their abutting land."

Governale v City of Owosso, 33
Mich App at 586 (1971); aff'd
387 Mich 626, 629 (1972)

CONCLUSION

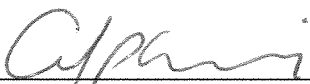
This is not a condemnation case, but a case about the scope of a public road easement. That scope is broad, encompassing use for all improvements which benefit the public. The improvements which

the Village of Dexter required of Dexter Development, LLC clearly are in the public interest, and thus within the scope of the public road easement. Plaintiffs have failed to demonstrate any reason why this Court should grant leave to appeal or otherwise disturb the correct holding of the Court of Appeals. Plaintiffs' Application should be denied.

Respectfully submitted,

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Dated: May 18, 2004

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